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National Employment Law Project

COMMUNITY LEGAL SERVICES
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Understanding the EEOC's New Criminal Records Guidance: Education and Enforcement Opportunities

Panelists:

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The Importance of the Update

- Employment plays an important role in the reentry process for the 700,000 individuals returning home from prison and millions of individuals cycling through local jails each year.

- At current incarceration rates, about 1 in 17 White men, 1 in 6 Hispanic men, and 1 in 3 African American men are expected to serve time in prison during their lifetime.

- Research has shown that employers are often unwilling to consider hiring individuals that have been recently incarcerated.

- Individuals returning home from prison or jail tend to be employed at much lower rates than their non–criminal justice involved counterparts.

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Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.

An Early Civil Rights Issue

- Title VII of the Civil Rights Act of 1964, as amended (Title VII), prohibits employment discrimination based on race, color, religion, sex, or national origin.
  - People must bring their complaints to the EEOC or a state or local civil/human rights agency.
- Since at least 1969, the EEOC has received, investigated, and resolved employment discrimination charges alleging that employers used criminal records in a discriminatory way, most often based on race or national origin.
- In 1975, a federal appeals court said that it was discriminatory under Title VII for an employer to "*disqualify for employment any applicant with a conviction for any crime other than a minor traffic offense*."
- In 1987, 1990, and 2006, the EEOC issued policy statements on this issue.

Reasons for Updating the Guidance

- Criminal records are now online
- Most employers now do criminal background checks for some or all jobs
- More working-age people have criminal records
- Government fosters reentry efforts, seeks to reduce costs
- Legal developments under Title VII

The New Guidance on the Consideration of Arrests and Convictions in Employment Decisions Under Title VII

- A criminal background check that asks for a person's entire criminal record is too broad.
- A criminal background check that targets the risks in the job and finds criminal conduct that relates to those risks is better.
- When such a criminal record is identified for an applicant or employee, give the person an opportunity to explain circumstances or mistakes in the record before excluding him from a job: "individualized assessment."

Records of Arrest

- Arrest records may be unreliable. They may not show what happened after the arrest. Were charges filed? Were charges dismissed? Even if prosecuted, people are presumed innocent until proven guilty.
- EEOC strongly discourages relying only on a record of an arrest. But, employers may make an employment decision based on the conduct underlying the arrest, if the conduct makes the person unfit for the position in question.

Records of Convictions

- A conviction is shown after plea agreements (most cases are negotiated now) or trials.
- Employers should only consider convictions that are related to the job, and employers should have a time limit for considering old convictions.
- Convictions may be wrong: for example, when personal identifying information is inaccurate or confused; after an expungement of the offense; after the record is sealed; when a person enters into diversionary program.

Discussion

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EEOC Employer Best Practices (Guidance pages 25-26)

- EEOC "best practices" are recommended policies (not required) to help employers establish fair and defensible screening practices consistent the requirements of Title VII of the Civil Rights Act of 1964.

The Very Basics

- Eliminate policies or practices that exclude people with a criminal record from employment.
- Train managers, hiring officials, and decision-makers about Title VII's anti-discrimination provisions.

Develop a Fair Policy

- Fashion narrowly tailored written policy and procedure, which includes:

  1. Identify the essential job requirements under actual circumstances;
  2. Specific offenses that may demonstrate unfitness for job;
  3. Determine the duration of exclusions;
  4. Maintain individual assessment (i.e., consider age at time of offense, number of offenses, rehabilitation, work history, etc.)

Develop a Fair Policy (continued)

- Document the policy's rationale:
  - record the justification for the policy and procedures
  - keep a record of consultations and research considered in crafting the policy
- Train key staff in how to implement the policy and procedures

Additional Precautions

- When asking questions about criminal records, limit inquiries to records for which exclusion would be job related for the position and consistent with business necessity
- Keep criminal record information confidential – use it only for intended purposes.

Remove Application Questions (Guidance pages 13-14)

- "As a best practice, and consistent with applicable laws, the Commission recommends that employers do not ask about convictions on jobs applications and that, if and when they make such inquiries, the inquiries be limited to convictions for which exclusion would be job related for the position in question and consistent with business necessity." (pages 13-14)

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Non-Traditional Hiring

- 12,000 applications per month
- 2000 hires a year
- > 6% have criminal records

Past Forward Maryland

www.pastforwardmd.org/index.cfm?page=profile_pamela

Why Do We Do It?

- Consistent with Johns Hopkins' mission and culture of the organization
- Decision to stay in East Baltimore, a crime-ridden declining neighborhood
- Re-entering offenders with no job are more likely to return to crime
- Jobs stabilize the community
- Great workers with great results

How Do We Do it?

- Guidelines
  - Pattern and type of offense(s)
  - Time since offense
  - Age at time of offense
- Go through normal application and interview process
- If chosen, reviewed by HR and Security
- If hired, background file kept in HR – manager does not know
- Coach assigned to support transition

Follow up Study # 1

- "Positive criminal background"
- Sample of 79 hired 2000 – 2005
  - 1 involuntary termination
  - 2 voluntary terminations
  - 1 leave of absence
  - 2 unknown
- 73 were still employed at Hopkins in 2005

Follow up Study # 2

- 2003 to 2006 – 491 employees hired with a positive criminal background
- 41% of applicants with positive records were hired
- In 2009, 212 (43%) are still employed at JHHS
- Turnover is lower than employees without records for the first 40 months
- Anecdotal observation – zero “problematic” terminations were ex-offenders

Unusual Referral Sources

- Referral relationships with:
  - Helping Up Mission (Homeless Shelter)
  - Catholic Charities' Christopher Place (Homeless Shelter / Employment Program)
  - Marian House (Women's Reentry Shelter)
  - Programs provide referrals and wrap around services for residents
- About 100 formerly homeless men work at Hopkins

Success Factors – External Programs

1. Have support of your security staff
2. Screen carefully for success
3. Help referrers build pre hire curriculum to meet your specific needs
4. Interview candidates prior to training program as if you were hiring
5. Use paid internships as trial employment
6. Use job coaches to support transition

Contact Information

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